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April 24, 2017

VIA CM/ECF

Molly Dwyer, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Ninth Circuit
James R. Browning Courthouse
95 Seventh Street
San Francisco, California 94103

Re: *Boeing Company v. NLRB*, Nos. 15-72894 and 15-73101
Response to Respondent NLRB's Letter, Filed April 17, 2017

Dear Ms. Dwyer:



The Boeing Company responds to the National Labor Relations Board's Rule 28(j) letter regarding *Banner Health System v. NLRB (Banner II)*, 851 F.3d 35 (D.C. Cir. 2017), which partly granted and partly denied enforcement of the Board's order in *Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015).

Banner II has little relevance to this case. The D.C. Circuit invalidated a confidentiality agreement miles apart from Boeing's policy and did not reach the legality of a second alleged policy regarding confidentiality during workplace investigations.

The invalidated agreement in *Banner II* concerned employee salaries and disciplinary action. 851 F.3d at 39. The policy in this case concerns information about ongoing HR investigations, where employers have strong, legitimate reasons to recommend confidentiality. Boeing Br. at 30-31.

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Banner II invalidated a clear directive: Banner's confidentiality agreement told employees that they "could be subject to . . . termination and possibly legal action" for sharing employee information. 851 F.3d at 39. Boeing's policy merely recommends confidentiality without any threatened discipline. Boeing Br. at 22.

In *Banner II*, "all new Banner hires were required to sign this Agreement." 851 F.3d at 39. Boeing's policy was communicated to employees much more sporadically. Boeing Br. at 39.

Given these differences, the D.C. Circuit's decision in *Banner II* suggests nothing about the present dispute. And while *the Board* in *Banner II* had also invalidated a separate confidentiality policy regarding workplace investigations, the D.C. Circuit did not address the legality of that policy because there was insufficient evidence that the employer maintained the alleged policy. 851 F.3d at 44. In concluding otherwise, the Board "made unwarranted logical leaps that the evidence cannot fairly support." *Id.*

Much the same could be said of the Board's contentions in the present case.

Respectfully submitted,

/s/ Allyson N. Ho

Allyson N. Ho
Lead Attorney for Petitioner
The Boeing Company

ANH/emh

cc: All Counsel of Record (via CM/ECF)

CERTIFICATE OF SERVICE

I certify that on April 24, 2017, the foregoing Letter of Petitioner The Boeing Company was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

N/A

Dated: April 24, 2017

/s/ Allyson N. Ho

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